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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1609

ROBBINS MEN'S & BOYS' WEAR CORP.,

Appellant,

v.

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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IN THE

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No. 74-1609

ROBBINS MEN'S & BOYS' WEAR CORP.,

Appellant,

v.

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

Appellee moves, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal herein from an order of the Court of Appeals of the State of New York, entered March 24, 1975, dismissing "upon the ground that no substantial constitutional question is involved," an appeal from an order of the Appellate Division (Second Department) which unanimously affirmed a decision of the Appellate Term (2nd and 11th Judicial Districts), that unanimously upheld N.Y.C. Administrative

Code §B15-37.0, reversing a decision of the Civil Court of the City of New York, Queens County (Jur. St., Appendix, 1a-10a). This motion is made on the the ground that the appeal does not present a substantial federal question, and that the judgment rests on an adequate non-federal basis.

Questions Presented

N.Y.C. Admin. Code §B15-37.0 provides that a person in possession of property acquired by the City of New York in eminent domain, who elects to remain as a tenant at will of the City, shall "pay the same rent in effect immediately prior to vesting of title." Where, however, the person in possession at title-vesting and electing to remain as a tenant at will of the City had been the owner thereof, so that no lease fixing rent was outstanding at title-vesting, the statute provides that he "shall pay the reasonable value for the use and occupancy of the premises" (§B15-37.0[c]; *infra*, p. 9).

1. Is a statute imposing the "same rent in effect immediately prior to vesting of title," as established by the occupant himself in agreement with his pre-condemnation landlord—so as to discourage delay of public projects by occupants seeking bargain rentals, exemption from real estate taxes, or both, and willing to prolong their occupancies for such benefits—repugnant to due process of law?

2. Does the fact that owners do not generally lease property to themselves so as to permit adoption of the "same rent in effect immediately prior to vesting of title"

for their continued occupancies, necessitating the equivalent statutory standard of reasonable rental value therefor, result in an invidious discrimination?

3. Where an occupant adduces no legally competent proof to establish rental value of the premises, is a judgment fixing rent for property condemned by the City at that actually prevailing immediately prior thereto, reviewable in this Court?

Facts

Appellant's flagrant distortion of the record facts necessitates a brief restatement thereof.

(1)

Appellant (Robbins) occupied 4 stores in a one story and basement structure on Jamaica Avenue in Queens, *i.e.*, 85% of the premises (A28, A36).* The area having been found substandard and insanitary, it was designated for urban renewal and revitalization with commercial store and office facilities (not federally aided), a Community College being scheduled for an adjoining site. Title to the subject property vested in the City on April 18, 1972 pursuant to Court order (A28). It was then assessed at $325,000 (A65; Ex. C-Block 10,100, Lots 2, 3).

The owner had leased the property in 1947 to Heralt Realty Corp. for a 25-year term expiring in July of 1972, with option to renew (Ex. D, pp. 1-2, 32; A66-68, A74).**

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* Numerals in parentheses following the letter "A" refer to pages of the appendix constituting the record before the Appellate Division.

** A copy of the 1947 lease to Heralt (Ex. D) is being forwarded herewith.

That 1947 lease required Heralt "at its own cost and expense to replace the present aged and outmoded buildings on the demised premises with a new building," stating that such redevelopment "constitutes the principal inducement to the lessor for the making of this lease," and also provided that all improvements were to become the owner's property at the end of the term (Ex. D, pp. 9, 10, 18-19; A75-76). Heralt agreed to pay an annual *net* rent of $16,000, plus "all taxes, water rates or charges and assessments," and to make all ordinary as well as structural repairs (A68, A71-72).

Upon replacing the old structure with a new commercial building, Heralt leased one store to Robbins in 1949 (A42-44). By 1964 Robbins leased 4 stores in the building for a 5-year term (A59, A62). The annual rent agreed to by the parties was $46,500 for the first two years; thereafter, $48,000 per annum plus 6% of gross receipts above $800,000, plus 85% of any increase in real property taxes above the 1966 amount thereof (A59). And, in March of 1969, Robbins received an extension to July 31, 1972 "at the same rent as at present" (A64).

(2)

On July 24, 1972, 3½ months after title vesting, the City commenced a proceeding in the Civil Court to remove appellant for failure to pay rent, and seeking judgment for the basic rent ($4,000 per month) prevailing at the time the City took title, *i.e.*, "the same rent in effect immediately prior to vesting of title" (N.Y.C. Admin. Code, §B15-37.0) [A18-22]. In that proceeding, Robbins stipulated that it had paid no rent to the City, and that it had elected to

remain in possession of the premises agreeing to deposit in escrow past-accrued rent, plus rent for "each additional month thereafter," at the rate of $1,000 per month (A26-28, A78). The escrowed funds were subsequently paid over to the City (A26-28, A78). Appellant thereupon proceeded with proof of fair rental value of the premises (A34).

Robbins' expert, Mitchell Fein, testified on direct examination that real estate taxes in amount of $1,000 per month was sufficient "rental" for the City, and that this was the basis of his opinion as to rental value (A38-40). Thus, he stated (A39-40):

> "Q. Is it fair to say you base your opinion on the $1,000 a month based upon the taxes now being paid on this property assuming taxes were collected?
> A. That is right."

Mr. Fein neither cited nor adduced any leases of similar store space in the area to support his thesis that rental value should be measured by taxes—without regard to maintenance, operating expenses or any return on investment.

Appellant's only other witness was one of its corporate officers, Robert Robbins. While testifying that "the store is pretty much unprofitable now" (A45-46), that witness acknowledged that he had been invited by the City's Department of Real Estate to justify a rent adjustment, but that he had produced no monthly profit or loss statements, sales tax or income tax returns, *i.e.*, the proof required

therefor (A50-52).* At the close of the trial, appellant requested that its rent be fixed by apportioning to the space it occupied 85% of Heralt's 1947 ground rental ($16,000), and the City moved for summary judgment (A55-56).

The following month, Robbins stipulated that "apparently there are some proceedings which one can utilize, tenant can utilize for the benefit of diminution of rent" (A77-79). The City pointed out, however, that a rent adjustment can only be made effective *in futuro*—"from the date of the submission of the documentation by the commercial tenant"—consequently, "for the rent we are suing for there is no administrative remedy" as Robbins had failed to produce any such proof (A79-82).

At no point in the 38 months of its continuing post-condemnation occupancy of the subject premises has appellant ever produced any income or expense statements showing a monthly decline in business volume, or sales tax returns on gross receipts, income tax returns or other documented proof warranting any reduction in the rent it had established by agreement with Heralt, and which was consequently the prevailing rent at title-vesting.

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* In contrast, as was shown in the Appellate Division and never disputed, *when Robbins produced evidence* of a monthly decline in store receipts at 298 Broadway in Manhattan, premises previously condemned in November of 1965, appellant's pre-condemnation rental of $10,000 per annum was reduced to $7,200 in April of 1966 —and again retroactively reduced a second time to $6,000 per annum in June of 1967. The rules governing post-condemnation rent adjustments are appended hereto as Appendix A (*infra*, pp. 21-23).

Opinions Below

1. *Civil Court.* The opinion of the Civil Court expressed "grave doubt whether the jurisdiction of the Court can be circumscribed by local law" fixing rents for the use of municipal property (Jur. St., p. 9a). It held that the statutory language (N.Y.C. Admin. Code, §B15-37.0[b]) "all persons in possession" could not have referred to subtenants such as Robbins. To hold otherwise, said the Court, would give "the City a most generous 'windfall'" because Heralt's 1947 ground rent was substantially less than appellant's rent for the rebuilt premises, and the City was "relieved of the payment of $19,500 in real estate taxes" (Jur. St., pp. 9a-10a). Despite the fact that when the City is thus "relieved" of taxes, it must levy them upon other taxpayers to defray the loss and provide a tax-free haven for Robbins, the Court fixed rental value at $21,000 per annum (Jur. St., p. 10a).* Ignoring the record proof that Robbins had failed to offer any of the data required for a rent adjustment, the Court construed the City's position that relief could not be retroactively extended therefor, as a stipulation "that there was, in fact, no machinery" for any such relief (*ibid.*). Reported: 72 Misc 2d 707.

2. *Appellate Term.* The Appellate Term unanimously reversed and directed judgment "for the amount sought in the petition" (Jur. St., p. 4a). It expressly held that the statutory provision "for the determination of rent was a proper exercise of authority by the City" (*ibid.*). Reported: 75 Misc 2d 104.

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* Since Robbins' occupancy for private commercial gain is not a public use, any tax exemption would violate basic law. *Town of Harrison* v. *Co. of Westchester*, 13 NY2d 258, 264 (1963). See, 54 ALR 3d (Tax Exemption), pp. 437 et seq.

3. *Appellate Division.* The Appellate Division unanimously affirmed, without opinion (Jur. St., p. 3a). Reported: 46 AD2d 1016.

4. *Court of Appeals.* The Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is involved" (Jur. St., p. 2a).

Statutes Involved

(1)

General City Law, §19 ["General Powers"] (20 McKinney's) empowers every city in the State of New York to manage and control its property, as follows:

> "Every city is granted power to regulate, manage and control its property * * * and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution * * *."

General City Law, §20 ("Grant of specific powers"), subd. 2, empowers every city "To take, purchase, hold and lease real and personal property within and without the limits of the city."*

(2)

N.Y.C. Admin. Code, §B15-37.0(a) [2 Williams Press 1971 ed., p. 561] provides that where all of a parcel is condemned, "all the covenants, contracts and engagements be-

* Similar provisions may be found in Mun. Home Rule Law, §19, subd. 1(a) (b) [35C McKinney's]. In addition, N.Y.C. Charter, §1603, subd. 3(b) [1 Williams Press 1971 ed.] authorizes the City's Mun. Service Admin. to "manage and superintend all real property of the city not used for public purposes, including real property acquired for a public purpose and not being currently utilized for such purpose."

tween landlord and tenant or any other contracting party touching the same, or any part thereof, upon the vesting of title in the city shall cease and determine and be absolutely discharged."

Subdivision (b) of said §B15-37.0, as amended by Local Law 57 of 1962, provides that all persons in possession of condemned premises and electing to remain as tenants at will of the City, shall "pay the same rent" prevailing at title-vesting, as follows:

> "b. All persons in possession of such premises at the time of the vesting of title thereto in the city, shall at the option of the city become tenants at will of such city and shall, unless the parties otherwise agree in writing, pay the same rent in effect immediately prior to vesting of title or unless within ten days after the vesting of title they shall elect to vacate and give up their respective holdings."

Subdiv. c of §B15-37.0 provides that a former owner shall pay reasonable rental value, as follows:

> "c. Where a person or persons in possession of the premises at the time of vesting of title thereto are the owners thereof, such person or persons shall at the option of the city become tenants at will of such city, unless within ten days after the vesting of title they shall elect to vacate and give up their holdings. Where such person or persons fail to vacate and give up their holdings, and become tenants at will of the city as herein provided, such person or persons shall pay the reasonable value for the use and occupancy of the premises."

ARGUMENT

Legislation requiring occupants of premises condemned for public use to pay the "same rent in effect immediately prior to vesting of title," pending relocation, is not repugnant to due process of law. Since there is no "same rent in effect immediately prior to vesting of title" for owners continuing in possession, requiring them to pay "reasonable value for use and occupancy of the premises" effects no invidious discrimination.

a. Appellant baselessly contends that the legislation (§B15-37.0[b]) is repugnant to "substantive due process."

(1)

Since the City of New York was fully empowered "to regulate, manage and control its property" (Gen. City Law, §19 and statutes cited *ante*, p. 8), the terms it imposes for the use thereof "are matters for the judgment of those who represent the municipality." *Admiral Realty Co.* v. *City of N. Y.*, 206 N.Y. 110, 125, 134-5 (1912). See, *Lynch* v. *United States*, 292 U.S. 571, 579 (1938); *United States* v. *Blumenthal*, 315 F.2d 351, 353 (3rd Cir., 1963); *Grill* v. *City of N.Y.*, 282 N.Y. 471, 483-4 (1940); *Mtr. of Mar Boats* v. *Halberg*, 58 Misc 2d 938, 941-2 (S. Ct., Kings Co., 1969), affd. 33 AD2d 732 (2nd Dept., 1969); *Robia Holding Corp.* v. *Walker*, 230 App. Div. 666, 667 (1st Dept., 1930), affd. 257 N.Y. 431, 435, 437 (1931); see also, 52 C.J.S. *Landlord and Tenant*, §502(1), p. 449.

The local legislature, in enacting L.L. 57 of 1962 (N.Y.C. Admin. Code, §B15-37.0[b]) requiring occupants of premises acquired by the City to "pay the same rent in effect immediately prior to vesting of title," thereby adopted a commonly recognized standard of rental value, and one which the tenant in possession had himself established by agreement with his landlord. In addition, the legislation would effectively discourage delay of the intended public project by occupants seeking a subsidy haven from rents, real estate taxes, or both, and to unduly prolong their occupancies therefor. The identical standard for post-title vesting occupancy was adopted by the Legislature of the State of New York for all public housing authorities. Pub. Hous. Law, §127 (44A McKinney's).

It is not irrational to continue the rent in effect at title-vesting and to expedite relocation by paying the costs and expenses thereof—rather than open the door to prolonged delay of public projects at hoped for bargain rentals, tax exemption, or both. "If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends (*U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 154)." *Defiance Milk Products Co.* v. *DuMond*, 309 N.Y. 537, 540-1 (1956).*

The doctrine "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded," and "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). See, *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Nettleton Co.* v.

* Relocation benefits in the City of New York are provided in N.Y.C. Admin. Code, ch. 53, §1160-1.0 et seq. (6 Williams Press 1971 ed., p. 945) and in Rules and Regulations of the Dept. of Relocation & Management Services (City Record, April 19, 1973). See City's relocation guide submitted herewith.

Diamond, 27 NY2d 182, 194 (1970); *Wasmuth* v. *Allen*, 14 NY2d 391, 397-8 (1964); *Mtr. of Spielvogel* v. *Ford*, 1 NY2d 558, 562 (1956). In fact, "whatever residual element of substantive law the Due Process Clause may still have (case cited), it essentially regulates procedure (cases cited)." *Boddie* v. *Connecticut*, 401 U.S. 371, 384 (1971) [concurring opn. of Douglas, J.].

(2)

Appellant baselessly asserts that prior to the 1962 amendment of §B15-37.0(b), requiring payment of the same rent prevailing at title vesting, "the New York Courts had denied the City the right unilaterally to fix" rent for the use of its property pursuant to *general land-law* (Jur. St., p. 16). This is a gross distortion of fact and law. Where an owner seeks eviction of an occupant whose rent *has not been fixed* by statute or agreement, damages for rent arrears must inevitably be fixed by a court on proof of rental value. 1 Rasch, N.Y. Landlord & Tenant (2d ed., 1971), §281, p. 366. See, *Vernon* v. *Brown*, 100 App. Div. 204, 206 (2nd Dept., 1889); *Marbridge Building Co., Inc.* v. *White*, 115 Misc. 320, 322-3 (App. T., 1921); *Land Assoc. Corp.* v. *Grand Union Stores*, 261 App. Div. 1014, 1015 (3rd Dept., 1941). And that was the situation in the cases relied on by appellant—*i.e.*, *N.Y.C. Hous. Auth.* v. *Philmo*, 187 Misc. 413, 414-415 (App. T., 1946); *N.Y.C. Hous. Auth.* v. *Knowles*, 200 Misc. 156, 160 (Mun. Ct., 1951) [Jur. St., p. 16].

There simply is no "general land-law" pursuant to which courts establish rents for the use of private or public property in usurpation of the owner's right to do so. See

52 C.J.S. *Landlord and Tenant*, §502(1), p. 449; 18 McQuillin, Municipal Corporations, §53.30a, pp. 197-198. In fact, even prior to the 1962 amendment of §B15-37.0(b), the condemnor uniformally fixed rent for an occupant's continued use of the property. "'As a matter of practice, the condemnor under such circumstances, customarily fixes the rent for which the tenant remains liable until ousted' (Levey, Condemnation in New York [1957], p. 229)." *Lentino* v. *Maltese*, 34 Misc 2d 650, 653 (Dist. Ct., 1962). Suffice it to say that Robbins' argument, predicated upon a non-existent "general land-law," was made to and repudiated by the Appellate Term, Appellate Division and Court of Appeals herein. And "the Constitution has not federalized the substantive law of landlord-tenant relations." *Lindsay* v. *Normet*, 405 U.S. 56, 66 (1972).

(3)

Similarly baseless is appellant's contention that a landlord-tenant relationship cannot arise under §B15-37.0(b). It is firmly established that continued possession, in the face of an owner's demand for rent or vacatur, results in a binding consent to remain on the terms demanded. *Coit* v. *Planer*, 51 N.Y. 647, 648 (1873); *Giordano* v. *Loperfido*, 203 App. Div. 164, 165 (1st Dept., 1922); *Farrell* v. *Woodward*, 101 Misc. 560, 566-7 (App. Term, 1st Dept., 1917); *Kaufman* v. *Bartels*, 182 Misc. 128, 129 (App. Term, 2nd Dept., 1944), lv. to app. den. 268 App. Div. 864 (2nd Dept., 1944). See also, *Vangrow* v. *Weiss*, 128 N.E.2d 822, 823-4 (Ct. App., Ohio, 1953); *Goldman* v. *Shulkin*, 320 Mass. 161 (1946), 69 N.E. 2d 573, 574.

Robbins' contentions that "the rule was abrogated by Statute, N.Y. Real Prop. L. §232-c," and that a holdover's

continued possession does not amount to acceptance of terms demanded by the owner, citing *Jaraslow* v. *Lehigh Valley R. Co.*, 23 N Y 2d 991 (1969)—was rejected by the appellate courts herein (Jur. St., pp. 17, 17fn., 23fn.). That cited case and statute altered the common law rule that a holding over automatically renews an expired lease. Where, however, a lease is *unequivocally terminated*, as on title-vesting, continued possession binds the occupant to the terms demanded therefor. *Lidsky* v. *Bragarnick*, 53 Misc 2d 649 (App. T., 1st Dept., 1967); *Realty Corp.* v. *Luftig*, 234 N.Y.S. 2d 462, 465 (Civil Ct., 1962, n.o.r.); *Mtr. of Lutz* v. *Metaxas*, 48 Misc 2d 924, 926-7 (Civil Ct., 1965); *Spencer* v. *Faulkner*, 65 Misc 2d 298, 299-300 (Civil Ct., 1971); *Mtr. of Reiner* v. *Kaslov*, 61 Misc 2d 960 (Civil Ct., 1970). In short, the legislation (§B15-37.0[b]) fully accords with "general land-law."

b. Appellant was not denied "procedural due process."

Robbins baselessly maintains that it "had a right or privilege of occupancy after condemnation"; that it had "rejected any tenancy"; and that, with its "right of possession" went a right to "a fair and reasonable occupational rent" (Jur. St., pp. 23-24).

There is, however, no right to possession of municipal property not dedicated to public use. The City is, in fact, statutorily afforded immediate possession of condemned property "without suit or other judicial proceedings" (N.Y.C. Admin. Code, §B15-36.0[c]; 2 Williams Press 1971 ed., p. 562). Moreover, by continuing in possession, Robbins had indeed become a tenant-at-will of the City, and had paid rent as such (*ante*, pp. 4-5). And, as aforenoted, a

rental established by the user itself shortly before title-vesting and statutorily adopted to preclude delayed relocation, may not fairly be deemed an irrational legislative standard (*ante*, pp. 10-12).

More fundamentally, however, availability of rent adjustments where the rent prevailing at title-vesting is excessive or condemnation has adversely affected the business, precludes one who admits it sought no rent adjustment—"Robbins concedes its election not to seek such 'hardship adjustment'" (Jur. St., p. 34)—and declines to avail itself of administrative and judicial review, from claiming denial of due process. Robbins had received two sharp reductions in rent at its Manhattan store upon adducing evidence in justification thereof, but had declined to produce any such evidence with respect to the subject site when *invited* by the Department of Real Estate to do so, and to thereby afford some basis for a rent reduction (*ante*, pp. 5-6).

Cognizant that the rent prevailing at title-vesting may not be fair or reasonable in every case, the City's rules provide for relief therefrom.* In view of appellant's failure to seek a rent adjustment, however, its contention that the City froze rents "at a high" by adopting the rent in effect at title-vesting is plainly specious—particularly as Robbins is now in its fourth year of post-condemnation occupancy, has not yet seen fit to relocate, and inflation has not "frozen" store rentals at their 1972 level but has increased them despite the statutory "freeze" herein (Jur. St., p. 27).

Robbins cites *Thorpe* v. *Housing Authority*, 386 U.S. 670, 671-2 (1967), 393 U.S. 268, 273-4, 276 (1969), where

* The regulations referred to were submitted to the New York appellate courts and are appended hereto as Appendix A.

this Court held that federal regulations governing eviction from "a federally assisted, low-rent public housing project" must be followed (Jur. St., pp. 19, 22). Bypassing the fact that we are here dealing with municipal property neither federally assisted nor in public use, and that eviction therefrom for non-payment of rent was sought in a court of law providing all protections required by due process—the City, nevertheless, does voluntarily follow HUD's standards for rent abatement (Appendix, *infra,* pp. 21-23).

Appellant also cites *Holmes* v. *N.Y.C. Housing Auth.,* 398 F.2d 262, 263-4 (2d Cir., 1968), where it was held that standards must be provided for "admission of tenants to low-rent public housing projects" so that, upon denial of tenancy pursuant thereto, applicants may "seek review of the Authority's decision, as provided by New York law under CPLR §7803(3)" [Jur. St., p. 21]. The difficulty with Robbins' position, however, is that it admittedly *failed to apply* for rent relief and to adduce substantiating evidence in support of any such application.

Appellant nevertheless proceeds to attack the adequacy of judicial review of discretionary administrative determinations provided by New York's CPLR §7808(3), citing *Holmes* v. *N.Y.C. Housing Auth.,* 398 F. 2d 262, 267, notes 6 and 7 (2d Cir., 1968) [Jur. St., p. 31]. Putting aside the obvious fact that one who does not even apply for rent adjustments is in no position to protest "denial" thereof—the cited case holds that review of discretionary administrative determinations pursuant to CPLR 7803(3) plainly meets procedural due process requirements (398 F.2d at p. 267, fn. 6). That a discretionary administrative

determination will be nullified by New York courts where unsupported by "substantial evidence," see *Mtr. of Gimprich* v. *Bd. of Educ. of City of N.Y.,* 306 N.Y. 401, 406 (1954). See also, *Mtr. of Fink* v. *Cole,* 1 NY2d 48, 53-54 (1956); *241 E. 222nd St.* v. *City Rent Agency,* 33 NY2d 134, 142-3 (1973); *Mtr. Sullivan Co. Harness* v. *Glasser,* 30 NY2d 269, 278 (1972).*

In short, Robbins' failure to apply for rent adjustment forecloses any claim that it was denied procedural due process, as does the availability of judicial review of any such denial had Robbins sought relief. *Lindsey* v. *Normet,* 405 U.S. 56, 63-64 (1972); *Thorpe* v. *Housing Authority,* 393 U.S. 268, 274 (1969); *McQueen* v. *Drucker,* 317 F. Supp. 1121, 1131 (Dist. Ct., Mass., 1970), affd. 438 F. 2d 781 (1st Cir., 1971).

c. The legislation contains no invidious discrimination between "ex-tenants" and "ex-owners."

Appellant maintains that §B15-37.0 discriminates between pre-condemnation tenants and owners. Since the latter do not enter into leases with themselves and cannot, therefore, be subjected to the "same rent in effect immediately prior to vesting of title" (§B15-37.0[b]), Rob-

* Similarly irrelevant here are appellant's citation (Jur. St., p. 21) of cases involving eviction of tenants from low-cost housing projects as "undesirables" (*Escalera* v. *N.Y.C. Hous. Auth.,* 425 F.2d 853 [2d Cir., 1970], cert. den. 400 U.S. 853 [1971]), or as "subversives" (*Rudder* v. *U.S.,* 226 F.2d 51, 53-54 [D.C. Cir., 1955])—where the basis for such determinations were not revealed by the administrative agency and not reviewed by the State courts since *mandamus* will only issue to compel action required by statute or regulation. Had Robbins applied for and been denied rent relief, such determination would be reviewable under CPLR 7803(3), since the agency's regulations provided for rent adjustments, as Robbins conceded (*ante,* p. 6).

bins says that the statute "distinguishes between those who owned the real estate and those who did not—between the haves and the have-nots" (Jur. St., p. 25). To demonstrate the "invidious" nature of that distinction, appellant asserts that as a result of the Civil Court's finding of " 'fair rental value' of the premises here to be $21,000 per year," that is the rent "a former owner would have paid for Robbins' premises" (Jur. St., p. 25). In contrast, because of the $48,000 basic rental agreed to by appellant prior to title-vesting, Robbins "owes over twice as much as they would have owed if they had owned the realty" (*ibid.*).

Appellant baselessly *assumes* that the Civil Court's erroneous reliance upon the rent in a 1947 lease, requiring the lessee to demolish an old building and construct a new one, was of probative worth in determining rental value of the rebuilt premises 25 years later—when clearly it was not, as a matter of law (*ante*, pp. 4-7). See, *Mtr. of City of N.Y.* (*Mott Haven Houses*), 33 Misc 2d 808, 811 (S. Ct., Bronx Co., 1960), affd. 16 AD2d 637 (1st Dept., 1962), affd. 13 NY2d 959 (1963). In fact, appellant's proof of rental value, *i.e.*, Heralt's 1947 ground rental requiring construction of the subject building, and its alternative "proof" that real estate taxes alone equal rental value, was so thoroughly insubstantial, as a matter of law, as to warrant appellate adoption of the rent actually prevailing at title-vesting *independently of statute*, thereby precluding any federal question. *Blum* v. *Fresh Grown Preserve Corp.*, 292 N.Y. 241, 245-6 (1944); *Mtr. of City of N.Y.* (*Expressway*), 9 NY2d 439, 445 (1961); *Katz* v. *State of N.Y.*, 10 AD2d 164, 166 (3rd Dept., 1960); *Mtr. of City of N.Y.* (*School Site*), 222 App. Div. 554, 559 (1st Dept., 1928), affd. 250 N.Y. 558 (1929).

Nevertheless, Robbins contends, in a similar vein, that the "maximum liability of a former owner is limited to the interest on his award" (Jur. St., pp. 25, 26-27). This, however, is not a measure of rental value. It is a denial of compensation for delay in paying the award *pendente lite*. The owner is not entitled to interest for any such period of delay during which he was not deprived of the beneficial use of his property. *Chester Litho* v. *Palisades Interstate Park Comm.*, 27 NY2d 323, 326 (1971). And the courts recognize a clear distinction between such denial of compensation for delayed payment of award, and rental value. See, *Urban Redev. Auth. of Pittsburgh* v. *Cleban*, 264 A.2d 187, 192 (1970), 216 Pa. Super. 269.

Since owners do not enter into leases with themselves, it is not possible to fix rents in reliance thereon for their use of premises acquired by a municipality. "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935). "If the classification has some 'reasonable basis,' it does not offend the constitution." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). See, *United States* v. *Kras*, 409 U.S. 434, 446 (1973); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Lindsey* v. *Normet*, 405 U.S. 56, 70-71 (1972). Section B15-37.0 reflects no invidious discrimination between pre-condemnation owners and tenants.

CONCLUSION

The appeal herein should be dismissed, with costs.

July 8, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel
of the City of New York,
Attorney for Appellee.

L. Kevin Sheridan,
Morris Einhorn,
of Counsel.

APPENDIX

City Urban Renewal Bureau Order No. 28

October 30, 1964

FROM: Raymond A. Pignato
Assistant Director
Urban Renewal Bureau

RE: *Rent Adjustments for Commercial Tenants on Urban Renewal Sites*

The Urban Renewal Manual provides that rents may be adjusted for a business concern on an Urban Renewal Site if the rate becomes unreasonable due to adverse conditions caused by project activities. When a Site Manager receives a request from a commercial tenant on his site for an adjustment on his rent, the following procedure is to be followed:

1. The Site Manager should require the tenant to submit, in affidavit form, a statement of income and expenses for the period in which he is basing his application for adjustment and for such other period or periods that the Site Manager deems appropriate to enable him to make a proper review and arrive at a decision.

The Site Manager should also require the tenant to submit an affidavit (in addition to the income and expense affidavit) setting forth the tenants justification for consideration on the part of the Site Manager to effectuate a rent adjustment.

2. Upon receipt of the above, the Site Manager is to evaluate the information supplied by the commercial ten-

ant. The Site Manager should consult with the Site Accountant or the Controller for guidance in his evaluation of the financial information supplied by the commercial tenant.

3. After the above reviews, the Site Manager should be in a position to determine if a rent adjustment is warranted and the amount of the adjustment.

4. Any rent adjustment that is made, is to be effective from the date of the submission of the documentation by the commercial tenant.

5. Each quarter, the Site Manager is to submit a report to the Bureau indicating the following:

(a) Number of rent adjustment requests received

(b) Number denied

(c) The number of adjustments made specifying:

1. Former rent
2. Adjustment rent
3. Effective date of the rent adjustment
4. Brief synopsis of the Managers justification for the adjustment.

/s/ Raymond A. Pignato
Raymond A. Pignato

Re: City's Urban Renewal Bureau Order No. 28

Rent Adjustments for Commercial Tenants.

March 4, 1969

The Urban Renewal Manual provides that rents may be adjusted for a business concern on an Urban Renewal Site if the rate becomes unreasonable due to adverse conditions caused by project activities. When a Site Manager receives a request from a commercial tenant on his site for an adjustment of his rent, the following procedure is to be followed:

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